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Supreme Court, U.S.
FILED
MAY 29 1992
OFFICE OF THE CLERK

No. 91-1719

In The

Supreme Court of the United States

October Term, 1991

CLAYTON J. CHARBONNET, JR., ET AL.,

Petitioners,

versus

SHERIFF HARRY LEE, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT LT. EDWIN McCLENDON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in granting Judgment Notwithstanding the Verdict to Respondent.

2. Whether Petitioners' claim under 42 U.S.C. § 1983 is controlled by the *Parratt/Hudson* doctrine.

PARTIES TO THE PROCEEDING IN THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

The parties in the U.S. Court of Appeals for the Fifth Circuit were:

Clayton J. Charbonnet, Jr.

Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation

Sheriff Harry Lee

Donald E. Strain, D.D.S., A Professional Dental Corporation

James D. Kiser, D.D.S., A Professional Dental Corporation

Joseph J. Collura, D.D.S., A Professional Dental Corporation

Lakeside Dental Group

Lt. Edwin McClendon

Continental Casualty Company

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SUMMARY OF THE ARGUMENT

This case presents no special or important considerations warranting review by this Court. Petitioners complain that the district court improperly granted Judgment Notwithstanding the Verdict ("JNOV") to Respondent on the basis of a defense which was not previously raised in Respondent's motion for directed verdict. Petitioners wrongly claim that the grant of a JNOV under these circumstances is always barred by Rule 50(b), Fed.R.Civ.P. The Fifth Circuit has counseled a liberal approach to this question and the JNOV was proper under the facts of this case. The district court did not abuse its discretion in granting the JNOV to Respondent.

Petitioners' claim under 42 U.S.C. § 1983 is controlled by the *Parratt/Hudson* doctrine,[1] not *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), as claimed by Petitioners. In *Zinermon*, this Court set out three factors which determine whether *Parratt* applies and each of these factors is present in this case. First, the deprivation of Petitioners' property was unpredictable and was unforeseeable by the Jefferson Parish Sheriff's Office. Second, due to the nature of the deprivation, pre-deprivation process was impossible. Third, the conduct of Respondent was random and unauthorized in the sense the term is used in *Parratt*. As these three conditions are met and Petitioners have an adequate post-deprivation remedy under state law which they are pursuing at this time (*see* Respondent's Appendix ("Resp. App.") 1 - Resp. App. 20), *Parratt* controls their claim and Petitioners cannot recover under 42 U.S.C. 1983.

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[1] The *Parratt/Hudson* doctrine derives from this Court's holdings in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420

(Continued on following page)

ARGUMENT

I. The district court did not abuse its discretion in granting Judgment Notwithstanding the Verdict to Respondent.

Petitioners contend that the district court improperly granted Respondent JNOV[2] as the JNOV was based upon a defense not previously raised by Respondent. This purely procedural issue raises no special or important considerations as would warrant discretionary review by this Court.

Petitioners argue that the district judge erred in granting a JNOV in favor of Respondent because the defense urged by Respondent in support of the JNOV (the *Parratt/Hudson* doctrine) was not raised in, and was different from the defense raised in, Respondent's motion for directed verdict (the qualified immunity defense).

At the close of Petitioners' case, Respondent moved for a directed verdict on the basis of qualified immunity. Respondent argued that he was not liable to Petitioners under § 1983 because he acted within the parameters of the official policy of the Jefferson Parish Sheriff's Office ("JPSO") and because he did not actively participate in the seizure of Petitioners' property. The trial court denied Respondent's motion for directed verdict and the jury submitted

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(1981), *overruled in part not relevant here* by *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

[2] Although Petitioners' argument on this issue is couched in terms of error by the district court, a trial court's ruling on a motion for JNOV is reviewed under the abuse of discretion standard. *Stokes v. Georgia-Pacific Corporation*, 894 F.2d 764 (5th Cir. 1990).

a verdict in favor of Petitioners. The trial court granted Respondent's post-trial motion for JNOV.

The Fifth Circuit upheld the district court's grant of JNOV to Respondent as follows:

> Nevertheless, the argument McClendon made in moving for a JNOV was not so different in nature from the argument he made at the directed verdict stage, nor based on such a different version of the facts, to suggest the sort of ambush that Rule 50(b) is meant to prevent. Dr. Charbonnet was not ambushed by a new argument questioning the evidence he presented at trial. If Dr. Charbonnet was trapped by the substance behind McClendon's argument for a JNOV, he was trapped not by any tactical trickery but by the *Parratt/Hudson* doctrine. In arguing for a JNOV McClendon was simply continuing to argue that his actions (now proved by Dr. Charbonnet) could not subject him to liability under § 1983.
>
> Under the *Parratt/Hudson* doctrine, § 1983 *cannot* subject a public official like McClendon to individual capacity liability for violating government policy. In opposition to McClendon's motion for a directed verdict, Dr. Charbonnet's lawyer argued that if neither Sheriff Lee nor his policy were responsible, 'then Lt. McClendon was in direct violation of the policy'. Dr. Charbonnet thus acknowledged at the directed verdict stage the grounds of McClendon's § 1983 defense at the JNOV stage. That McClendon's revival of his defense to § 1983 liability was made under a different line of cases – cases that preclude a federal court from subjecting certain

> public officials to liability because their actions do not implicate the Fourteenth Amendment – does not violate Rule 50(b). (footnote omitted) (emphasis in original)
>
> Petitioners' Appendix ("Pet. App.") 24

The Fifth Circuit correctly found that the district court's grant of JNOV to Respondent was proper. The grant of a JNOV to a party on the basis of the *Parratt/Hudson* doctrine, following a motion by that party for directed verdict on the basis of qualified immunity, is fully consonant with the policy of Rule 50(b). The particular purposes of Rule 50(b) should be examined in considering a request for JNOV. *Merwine v. Board of Trustees for State Institutions of Higher Learning*, 754 F.2d 631 (5th Cir. 1985), *cert. denied*, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62; *Bohrer v. Hanes Corporation*, 715 F.2d 213 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984). The purposes of Rule 50(b) are:

> to enable the trial court to re-examine the question of evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to the jury, thereby affording it an opportunity to cure any defects in proof should the motion have merit.
>
> *Merwine v. Board of Trustees for State Institutions of Higher Learning*, 754 F.2d at 634 (5th Cir. 1985), *cert. denied*, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62, *quoting Villanueva v. McInnis*, 723 F.2d 414, 417 (5th Cir. 1984)

As acknowledged by the Fifth Circuit in its opinion, Petitioners were "not ambushed by a new argument questioning the evidence [they] presented at trial." Pet. App. 24. In fact, the nature of the evidence necessary to prove a defense of qualified immunity is not so different from the nature of the evidence necessary to prove a *Parratt/Hudson* defense as to constitute an impermissible "trap" for Petitioners.

The Fifth Circuit has recognized that the general rule that a party may not base a motion for JNOV on a ground not included in a prior motion for directed verdict is not to be applied uniformly or mechanically, *Jones v. Benefit Trust Life Insurance Company*, 800 F.2d 1397 (5th Cir. 1986); *Merwine v. Board of Trustees for State Institutions of Higher Learning*, 754 F.2d 631, 634-35, n.2 (5th Cir. 1985), *cert. denied*, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62,[3] and in some cases "liberal application of the rule is appropriate." *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021, 1024, and n.4 (5th Cir. 1987).

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[3] In *Jones*, the defendant moved for JNOV on a particular issue of damages and its motion for directed verdict had been based only on issues of liability. The Fifth Circuit held that the JNOV was proper as the defendant had made an objection to the proposed jury charge on the particular damages issue and had thereby preserved its right to raise the issue in a motion for JNOV. In *Merwine*, plaintiff contended on appeal that the district court should not have granted defendant's motion for JNOV on both a Title VII claim and a § 1983 claim because, according to plaintiff, defendant's motion for directed verdict was addressed solely to the Title VII claim. The Fifth Circuit held that the district court properly granted JNOV on both claims:

(Continued on following page)

Thus, under the Fifth Circuit's flexible approach for ruling on a motion for JNOV, the district court did not abuse its discretion under Rule 50(b) in granting Respondent JNOV. Therefore, Petitioners' application for a writ of certiorari should be denied.[4]

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> We are convinced, however, that motions for directed verdict were made both to the Title VII claims tried by the court and to the § 1983 claim tried by the jury. While Lewis' motion did not specifically refer to the § 1983 claim, he did cite, in furtherance of his motion for directed verdict, the lack of evidence to prove *elements* of the § 1983 claim. (emphasis in original)

754 F.2d at 634, n.2

[4] In their Petition for Writ of Certiorari, Petitioners also urge in passing that the JNOV was also improper under the waiver rule of Rule 12(h)(2), Fed.R.Civ.P., and because it was not set forth in the pre-trial order. However, as the waiver argument was not presented to or considered by either court below, this Court should decline to consider it for the first time. *See Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, ___ U.S. ___, 111 S.Ct. 913, 917, ___ L.Ed.2d ___ (1991); *Kamen v. Kemper Financial Services, Inc.*, ___ U.S. ___, 111 S.Ct. 1711, 1716-17, n.4, ___ L.Ed.2d ___ (1991).

The pre-trial order argument is also without merit as Rule 16(e) authorizes modification of the pre-trial order "to prevent manifest injustice." Petitioners' conclusory, one-sentence argument on this point does not even address the issue of the district court's authority to modify a pre-trial order or the question of manifest injustice.

II. Petitioners' claim under § 1983 is controlled by the *Parratt/Hudson* doctrine. Therefore Petitioners cannot recover under § 1983.

According to Petitioners, they are entitled to recover under § 1983 as their claim is governed by *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), rather than *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled in part not relevant here* by *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Both the district court and the Fifth Circuit held that Petitioners' claim under § 1983 was barred by the *Parratt/Hudson* doctrine. In reaching its decision that *Parratt*, rather than *Zinermon*, controlled, the Fifth Circuit followed its recent *en banc* decision in *Caine v. Hardy*, 943 F.2d 1406 (5th Cir. 1991) (en banc), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1474, 117 L.Ed.2d 618 (1992).

Contrary to Petitioners' assertion, their case is not controlled by *Zinermon*. In *Zinermon*, the plaintiff was admitted to and stayed five months in a state mental hospital on the basis of his signature on a voluntary admission form. At the time of signing the form, he was heavily medicated, disoriented and suffered from a psychotic disorder. Plaintiff sued under 42 U.S.C. § 1983 for deprivation of liberty without due process of law. This Court held that plaintiff's claim was not controlled by *Parratt/Hudson* for the following three reasons:

> First, [defendants] cannot claim that the deprivation of Burch's liberty was unpredictable . . . It is hardly unforeseeable that a person requesting treatment for mental illness might be

incapable of informed consent . . . Any erroneous deprivation will occur, if at all, at a specific, predictable point in the admission process – when a patient is given admission forms to sign.

. . .

Second, we cannot say that pre-deprivation process was impossible here . . .

In *Parratt*, the very nature of the deprivation made predeprivation process 'impossible.' 451 U.S., at 541, 101 S.Ct., at 1916. It would do no good for the State to have a rule telling its employees not to lose mail by mistake, and it 'borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct.' *Daniels*, 474 U.S., at 342, n. 19 106 S.Ct., at 680, n. 19 (STEVENS, J., concurring in judgments). In *Hudson*, the errant employee himself could anticipate the deprivation since he intended to effect it, but the State still was not in a position to provide predeprivation process, since it could not anticipate or control such random and unauthorized intentional conduct . . .

Third, [defendants] cannot characterize their conduct as 'unauthorized' in the sense the term is used in *Parratt* and *Hudson*. The State delegated to them the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement. In *Parratt* and *Hudson*, the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate (for persons unable to protect their

> own interests) the procedural safeguards required before deprivations occur . . .
>
> We conclude that [defendants] cannot escape § 1983 liability by characterizing their conduct as a 'random, unauthorized' violation of Florida law which the State was not in a position to predict or avert, so that all the process Burch could possibly be due is a post-deprivation damages remedy.
>
> 110 S.Ct. at 989-90

This Court found that the state should have foreseen and predicted the possibility of abuse of discretion by its employees in admitting patients to a mental hospital and therefore should have established rules and procedures designed to limit and direct that discretion so as to prevent abuse. Instead the state granted unlimited discretion during the admission process and the foreseeable violation of rights occurred. Therefore, inadequate predeprivation remedies were in place and *Parratt* did not bar Burch's claim. This Court pointed out that, if appropriate limitations on discretion had been in place to limit the state employees' authority and to guide their decisions so as to prevent foreseeable deprivations and Burch's rights had nonetheless been violated, *Parratt* would have barred Burch's claim. In such a situation the state would have had in place procedures to prevent abuses of discretion and violation of rights and could do no more than offer adequate post-deprivation remedies for a violation of those procedures and rights. The state could not be expected to provide anything else to prevent random and unauthorized acts. As this Court observed, rules prohibiting negligent or intentional misconduct are absurd.

These principles were refined and reaffirmed by the Fifth Circuit *en banc* in *Caine v. Hardy, supra.* In *Caine v. Hardy, supra,* plaintiff raised a procedural due process claim based on the allegedly improper suspension of his hospital staff privileges. The Fifth Circuit *en banc* analyzed *Zinermon* as follows:

> *Zinermon* holds that if 'random and unauthorized' conduct of state actors is alleged, the mere existence of even an 'adequate' post-deprivation remedy does not satisfy procedural due process where (a) the particular pre-deprivation administrative procedure presents a high risk of erroneous deprivation, and (b) there is a substantial likelihood that further minimal procedural safeguards could prevent the erroneous deprivation. *Zinermon* thus requires a hard look at a *Parratt/Hudson* defense to determine whether the state officials' conduct, under all the circumstances, could have been adequately foreseen and addressed by procedural safeguards. *Zinermon* did not explicitly or implicitly disavow the *Parratt/Hudson* doctrine; instead, it requires case-by-case analysis of the deprivation at issue. *See* 100 S.Ct. at 987-90.
>
> *Zinermon* stated three preconditions for application of the *Parratt/Hudson* doctrine: the deprivation must truly have been unpredictable or unforeseeable; the predeprivation procedures must have been impotent to counter the state actors' particular conduct; and the conduct must have been 'unauthorized' in the sense that it was not within the officials' express or implied

> authority. *Id.* at 987-88. Each of these criteria is established in the case before us.
>
> 943 F.2d at 1413

Application to Petitioners' claim of the "case-by-case analysis" counseled by this Court in *Zinermon* and articulated by the Fifth Circuit in *Caine* mandates the conclusion that the district court properly applied *Parratt* to Petitioners' claim. As shown by the following analysis, each of the three preconditions for application of *Parratt* is present in this case.

1. The deprivation was truly unpredictable or unforeseeable.

Petitioners allege that Respondent "cannot claim that the deprivation of Dr. Charbonnet's property was unpredictable. The JPSO was clearly aware of the fact that its officers were regularly involved in civil matters outside of the civil seizure process. The JPSO could predict when deprivations would occur as a result of an officer's actions and promulgated a policy with respect thereto. Lt. McClendon himself could specifically predict when deprivation would occur in this instance." Petition for Writ of Certiorari ("Petition") at 23.

Petitioners' claim that the JPSO "could predict when deprivations would occur as a result of an officer's actions" is meritless. The predictability in *Zinermon* arose from the fact that a deprivation, if any, would occur at a precise point in time, i.e., at the moment an individual seeking admission to a state mental hospital (who very likely lacked capacity to give consent) was given consent forms to sign. In a case like *Parratt* (or this case), on the

other hand, there is absolutely no way for the state to know when an employee will destroy a package intended for another person, or when an employee will disregard an official policy of non-intervention and become involved in a situation from which he was specifically directed to refrain. Petitioners appear to confuse the state's knowledge that violations of the type in *Parratt* or this case *will occur* with the state's knowledge (or lack thereof) of precisely *when* such violations will occur.

Further, Petitioners' focus on the ability of *Lt. McClendon*, an individual state actor, to foresee or predict the deprivation illustrates a basic misunderstanding of the issue. "[A]n individual state employee's ability to foresee the deprivation is 'of no consequence,' because the proper inquiry under *Parratt* is 'whether the *state* is in a position to provide for predeprivation process'." *Zinermon*, 110 S.Ct. at 985-86, *quoting Parratt*, 104 S.Ct. at 3204 (emphasis in *Zinermon*). *See Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990) (*en banc*), *cert. denied*, ___ U.S. ___, 111 S.Ct. 783 (1991).

2. Predeprivation procedures could not have countered the particular conduct of Lt. McClendon.

The controlling inquiry in determining whether a procedural due process claim is barred by *Parratt* is "whether the state is in a position to provide for predeprivation process." *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393 (1984). It is difficult to imagine what sort of predeprivation process the state could have provided to prevent the particular conduct of Lt. McClendon. Petitioners claim that "predeprivation

proceedings were available here. Louisiana had in effect a procedure for obtaining proper court authority to seize the property of another." Petition at 23. Petitioners' claim misses the mark. The so-called "procedure for obtaining proper court authority to seize the property of another" was available to the creditors of Dr. Charbonnet (his three soon-to-be former partners), not to Respondent.

The only available process under Louisiana law was writs of seizure, fi fa or sequestration – none of which was the responsibility of Lt. McClendon and indeed he had no standing to seek them. These three private individuals (Dr. Charbonnet's partners) could have complied with state law and obtained the required writs through judicial proceedings before they appeared at Dr. Charbonnet's door demanding the property. The question is, after they failed to do so, what policy and procedures did Sheriff Lee have in place to restrict the discretion and authority of his officers, including Respondent, in such a situation. As the sheriff had anticipated such a situation and by policy and procedures had properly restrained the discretion and authority of his deputies, then he did all he could do. The random, unauthorized act followed. Therefore *Parratt* applies and Petitioners have no claim under § 1983.

3. Lt. McClendon's conduct was "unauthorized." It was not within his express or implied authority.

The trial judge specifically found that the policy of the JPSO of non-intervention or neutrality in civil matters

was constitutional.[4] The jury found that Lt. McClendon violated this policy when he did not remain neutral to preserve the peace.

But Petitioners argue that "Lt. McClendon cannot now properly claim that his conduct was 'unauthorized' in the same sense as that term was employed in *Parratt/Hudson*." Petition at 24. In stark contrast to the broad power given to the staff of the mental hospital in *Zinermon*, Lt. McClendon was given *no power* to exercise any judgment as to whether to intervene or to remain neutral. The sheriff's policy forbade intervention by Lt. McClendon. He violated that policy by failing to remain neutral. *See also Soldal v. County of Cook*, 923 F.2d 1241 (7th Cir. 1991), *vacated and rehearing en banc granted*, 931 F.2d 445, *panel opinion reinstated in part*, 942 F.2d 1073, *cert. granted*, ___ U.S. ___, 112 S.Ct. 1290, 117 L.Ed.2d 514 (March 9, 1992), where the panel opinion held, on substantially identical facts, that the acts of the defendant deputy sheriffs were "random and unauthorized acts of subordinate public officers." 923 F.2d at 1248.[5]

Adequate post-deprivation remedies

There can be no serious question as to the presence of an adequate post-deprivation remedy for Petitioners.

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[4] This finding was not appealed by Petitioners.

[5] The Petition for Writ of Certiorari in the *Soldal* case did not seek review on the procedural due process issue. Therefore the finding that the acts of the deputy sheriffs were random and unauthorized is final.

Indeed, they are in the process of availing themselves of that remedy – a state tort action against Sheriff Lee and Lt. McClendon in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, which is pending at this time. *See* Petition for Damages and First Supplemental Amended Petition for Damages in *Clayton J. Charbonnet, Jr. et al. v. Donald E. Strain & Associates (A Professional Dental Corporation) et al.*, No. 374-563, 24th Judicial District Court of the Parish of Jefferson, State of Louisiana, attached as Resp. App. 1 - Resp. App. 20.[6] The Fifth Circuit recognized in *Caine v. Hardy* that such an action constitutes an adequate post-deprivation remedy under the *Parratt* analysis. 943 F.2d at 1414, n. 6.

CONCLUSION

The Fifth Circuit in *Caine v. Hardy* observed that "as *Zinermon* counseled case-by-case application of its principles, so it seems at this stage to represent a sui generis situation." 943 F.2d at 1415. The facts of this case simply do not justify a departure from this observation. This Court denied the Petition for Writ of Certiorari in *Caine v. Hardy*. The Fifth Circuit correctly found that Petitioners'

[6] These two pleadings appear in the district court's record as Exhibits A and B to Respondent's Motion for Judgment Notwithstanding the Verdict and Alternatively for a New Trial, filed December 14, 1989, rec.doc. 82.

claim was controlled by *Caine*. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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24TH JUDICIAL DISTRICT COURT FOR
THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 374-563 DOCKET NO.

DIVISION

CLAYTON J. CHARBONNET, JR.
and CLAYTON J. CHARBONNET,
JR., D.D.S., A PROFESSIONAL CORPORATION

versus

DONALD E. STRAIN & ASSOCIATES (A PROFESSIONAL DENTAL CORPORATION), JAMES D. KISER, D.D.S., A PROFESSIONAL DENTAL CORPORATION, JOSEPH J. COLLURA, D.D.S., JR. (A PROFESSIONAL DENTAL CORPORATION), DONALD E. STRAIN, JAMES D. KISER, JOSEPH J. COLLURA, JR. AND LAKESIDE DENTAL GROUP

FILED: _____ _____
DEPUTY CLERK

PETITION FOR DAMAGES
(Filed Jan. 9, 1989)

NOW INTO COURT, through undersigned counsel, come plaintiffs, Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation, who, with respect represents:

1.

Clayton J. Charbonnet, Jr. ("Charbonnet") is an individual residing in Jefferson Parish, Louisiana and Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation ("Charbonnet Corporation") is incorporated in the State

of Louisiana with its principal place of business in Jefferson Parish, Louisiana (collectively "Charbonnet").

2.

(A) Donald E. Strain ("Strain") is an individual residing in Jefferson Parish, Louisiana and Donald E. Strain & Associates (A Professional Dental Corporation) ("Strain Corporation") is incorporated in the State of Louisiana with its principal place of business in Jefferson Parish, Louisiana (collectively "Strain").

(B) James D. Kiser ("Kiser") is an individual residing in Jefferson Parish, Louisiana and James D. Kiser, D.D.S., A Professional Dental Corporation ("Kiser Corporation") is of business in Jefferson Parish, Louisiana (collectively "Kiser").

(C) Joseph J. Collura, Jr. ("Collura") is an individual residing in Jefferson Parish, Louisiana and Joseph J. Collura, Jr., D.D.S. (A Professional Dental Corporation) ("Collura Corporation") is incorporated in the State of Louisiana with its principal place of business in Jefferson Parish, Louisiana (collectively "Collura").

(D) Lakeside Dental Group ("LDG") is a partnership comprised in whole or in part of the Strain Corporation, Kiser Corporation and Collura Corporation. LDG maintains its principal place of business in the Parish of Jefferson, State of Louisiana. (These defendants are collectively called "the dentists".)

3.

Plaintiffs request trial by jury on all matt4ers contained in the Complaint.

FACTS

4.

Effective July 1, 1987, Charbonnet Corporation and defendants Strain Corporation, Kiser Corporation and Collura Corporation entered into a partnership for the practice of dentistry under the name "Lakeside Dental Group". On information and belief, prior to that time, LDG was a partnership comprised of Collura Corporation, Kiser Corporation and Strain Corporation.

5.

Charbonnet Corporation was induced to enter the partnership by numerous promises and representations made by defendants including promises and agreements as to compensation and sharing of profits generated by LDG.

6.

Over the course of a period greater than one year, the dentists breached obligations and provisions of the partnership agreement, made decisions contrary to Charbonnet's best interests and failed to provide Charbonnet with items that LDG was obligated to provide under the terms of the partnership agreement.

7.

On or about August 30, 1988, Charbonnet announced that Charbonnet Corporation intended to withdraw from LDG.

8.

Charbonnet expressed his expectation that Charbonnet Corporation's partnership interest would be amicably distributed in due course and under proper administration and at no time during the meeting held on or about August 30, 1988 did the dentists indicate that they would not engage in amicable efforts to distribute partnership proceeds, assets and property to Charbonnet.

9.

On August 31, 1988, Collura, acting as an agent for and with the blessing of the dentists, contacted the JPSO and obtained the services of a JPSO Deputy to accompany Collura, Strain and Kiser to Charbonnet's office at 5036 Yale Street, Suite 301, Metairie, Louisiana and to assist them, under color of law, in the removal of property from that location.

10.

The dentists, along with the JPSO Deputy (who was acting in the course and scope of his employment or with the apparent authority of the JPSO), all acting under color of state law, arrived and entered 5036 Yale Street, Suite 301, Metairie, Louisiana at approximately 8:00 p.m. on August 31 and, in spite of Charbonnet's protestations and

without a writ of sequestration, attachment, order or other documents entitling them to take possession of any property, and without an inventory of any kind, seized furniture, dental equipment, lab equipment, patient charts, and personal items in Charbonnet's office.

11.

The items removed from Charbonnet's office were taken into the defendants' custody at a location remote from Charbonnet's office.

12.

During the course of their activities, the defendants damaged the walls, ceiling, plumbing, electrical wiring and carpet in Charbonnet's office.

13.

Despite demand, the dentists have failed to return any property to Charbonnet.

14.

Beginning on our about August 31, 1988, the dentists engaged in a pattern and practice of calling Charbonnet's patients and, unilaterally, without Charbonnet's consent, cancelling appointments made by those patients with Charbonnet and representing, among other things, that Charbonnet was unable to treat patients.

15.

Further, from and after August 31, 1988, the dentists carried on a pattern and practice of disseminating false and misleading information to Charbonnet's patients including advising patients that, among other things, Charbonnet was no longer practicing orthodontia, the patient should not be treated by Charbonnet and/or the payment for services rendered by Charbonnet in the future would have to be made to LDG.

16.

Since August 31, 1988, the dentists have taken control of and have made improper distribution of LDG finances including failing to distribute any earnings to Charbonnet.

17.

Further, without properly accounting for or inventorying the property seized from 5036 Yale Street, Suite 301, Metairie, Louisiana, the dentists have begun to utilize that property in the performance of their practice despite the fact that the vast majority of such seized property was and is owned by Charbonnet.

18.

Charbonnet does not have a written inventory of all items seized from his office and, accordingly, Charbonnet has, by memory, made a list of all items belonging to him

which were seized by the dentists and the Jefferson Parish Sheriff's Office Deputy acting under the color of state law.

19.

Subsequent to the seizure of the property from 5036 Yale Street, Suite 301, Metairie, Louisiana, the dentists submitted to Charbonnet an inventory of the property seized by them. The referenced inventory contains some property which Charbonnet, through memory, does not recall and omits certain other items which were in fact taken from Charbonnet's office at 5036 Yale Street, Suite 301, Metairie, Louisiana on August 31, 1988.

COUNT I

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Charbonnet incorporates in this count each of the previous allegations and representations made in this Complaint.

20.

At all times pertinent hereto, the dentists and JPSO knew that their actions would deprive Charbonnet of his ability to engage in the practice of orthodontics for which he was qualified.

21.

Despite the dentists' knowledge that they had no immediate use of the property which they seized on August 31, 1988 and despite further knowledge that such property was essential to Charbonnet's ability to carry on his professional practice, defendants nonetheless engaged in the seizure of the property and recklessly, wantonly, negligently and intentionally inflicted on Charbonnet severe emotional distress, mental anguish in the amount of $500,000, and caused loss of professional reputation and practice in the amount of $750,000.

COUNT II
CONVERSION AND DESTRUCTION OF PROPERTY

Plaintiff incorporates in this count each of the previous allegations and representations made in this complaint.

22.

At all times pertinent hereto, the dentists, by taking possession of and beginning to use petitioner's property, have improperly converted that property to their own and have damaged the premises at 5036 Yale Street, Suite 301, Metairie, Louisiana thereby depriving Charbonnet of property which is rightly Charbonnet's for which defendants are indebted unto Charbonnet in the full amount of the value thereof which amount is currently estimated to be $115,000.

23.

As a further result of the seizure and destruction of Charbonnet's property, he has had to spend significant time and money replacing and/or repairing items of which he was wrongfully deprived. It is currently estimated that petitioner will spend approximately $115,000 to replace and/or repair the property which was wrongfully converted or damaged.

24.

As a result, Charbonnet will have to borrow funds which he would not have otherwise borrowed and will suffer the loss of use of that money either through the loss of investment interest or through the payment of interest charged by a lending institution. Defendants are liable for reimbursement of all such loss of use of Charbonnet's money and/or the payment of such interest.

25.

Further, Charbonnet will have to spend substantial personal time and energy in repairing, recovering and repurchasing property. Charbonnet is entitled to compensation for the fair value of that time.

COUNT III

BREACH OF FIDUCIARY DUTY AND ACCOUNTING

Plaintiff incorporates in this count each of the previous allegations and representations made in this Complaint.

26.

At all times pertinent hereto, the dentists owed Charbonnet a fiduciary duty as partners to treat Charbonnet fairly, make proper distributions and accountings of partnership property and earnings and to treat Charbonnet in a fair and equal manner until such time as Charbonnet is paid the fair value of Charbonnet Corporation's partnership interest.

27.

The dentists and LDG are required by Louisiana law to pay to Charbonnet Corporation the fair market value of Charbonnet Corporation's interest in LDG as of the date of the termination of such interest.

28.

The dentists breached each of these obligations and have failed to pay Charbonnet Corporation the value of its interest in LDG and have likewise failed to return to Charbonnet all property which actually belongs to it and not to the partnership.

29.

As a result of the foregoing, Charbonnet is entitled to an accounting establishing the full value of its interest in the partnership and immediate distribution of the value thereof along with legal interest from the day the partnership terminated as well as to an accounting of the value of all property seized from him and either the immediate

return of or alternatively payment for the value of the property so seized.

COUNT IV
UNFAIR TRADE PRACTICES

Charbonnet incorporates in this count each of the previous allegations and representations made in this Complaint.

30.

La. R.S. 51:1405 sets forth a cause of action for unfair methods of competition. That statute specifically outlaws any practice which may be deemed "an unfair method of competition".

31.

The dentists engaged in an unfair and prohibited method of competition by, among other things, seizing Charbonnet's professional property making it difficult, if not impossible, for Charbonnet to service patients by seizing appliances and devices fabricated by Charbonnet and needed by patients as part of their treatment, by unilaterally cancelling appointments made with Charbonnet, by disseminating false information concerning the nature of Charbonnet's practice.

32.

As a result of the foregoing, Charbonnet is entitled, pursuant to La. R.S. 51:1409, to full reimbursement for

ascertainable loss of money and movable property along with treble damages, reasonable attorney's fees and costs.

33.

Charbonnet calculates its ascertainable loss of money through loss of business, including loss of revenues from all appointments cancelled by the dentists, and loss of future business in the amount of $750,000 and movable property valued at approximately $100,000 as previously identified herein.

COUNT V
DEFAMATION

Charbonnet incorporates in this count each of the previous allegations and representations made in this Complaint.

34.

In disseminating to members of the public that Charbonnet was out of business, unable to treat patients, did not have an interest in treating patients who would owe money to LDG and making other misrepresentations concerning Charbonnet's professional practice and competency, the dentists have defamed Charbonnet. The defamation is both *per se* and by innuendo.

35.

As a result of the foregoing, Charbonnet is entitled to damages including emotional distress, mental anguish

and damage to Charbonnet's reputation in the amount of $500,000 and loss of business in the amount of $750,000.

WHEREFORE, Charbonnet prays that this Complaint be filed and that defendants be duly served and cited with same and that after all due proceedings are had herein, that there be judgment in favor of plaintiffs, Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation and against defendants Sheriff Harry Lee, The Jefferson Parish Sheriff's Office, Donald E. Strain & Associates (A Professional Dental Corporation), James D. Kiser, D.D.S, A Professional Dental Corporation, Joseph J. Collura, Jr., D.D.S. (A Professional Dental Corporation), Lakeside Dental Group, Donald E. Strain, James D. Kiser and Joseph J. Collura, Jr., jointly, severally and in solido for the amounts prayed for in the body of the Complaint, and for all costs and attorney's fees and all equitable relief.

LOWE, STEIN HOFFMAN & ALLWEISS

By: /s/ Illegible
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Attorneys for Plaintiffs,
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D.D.S., A Professional Corporation

PLEASE SERVE:

Hold Service

24TH JUDICIAL DISTRICT COURT FOR
THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 374-563 DIVISION "B"

CLAYTON J. CHARBONNET and
CLAYTON J. CHARBONNET, JR., D.D.S.
A PROFESSIONAL DENTAL CORPORATION

versus

DONALD E. STRAIN, D.D.S., A PROFESSIONAL DENTAL CORPORATION, JAMES D. KISER, D.D.S., A PROFESSIONAL DENTAL CORPORATION, JOSEPH J. COLLURA, D.D.S., A PROFESSIONAL DENTAL CORPORATION and LAKESIDE DENTAL GROUP

FIRST SUPPLEMENTAL AMENDED
PETITION FOR DAMAGES

(Filed March 30, 1989)

NOW INTO COURT, through undersigned counsel, come plaintiffs, Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr., D.D.S., a Professional Dental Corporation, who, by filing this First Supplemental and Amending Petition supplements and amends the original petition previously filed herein in the following particulars:

1.

Plaintiffs reincorporate and reallege as if copied here in extenso, each and every allegation made in the original petition except as amended hereby.

2.

By adding as additional defendants listed in paragraph 2 the following:

1) Harry Lee, Sheriff of Jefferson Parish, a person of the full age of majority and a resident of this parish.

2) Lt. Edward McClendon, a person of the full age of majority and a resident of this parish.

3) Continental Casualty Company, a foreign insurer authorized to do and doing business in Louisiana, which at all times pertinent hereto provided liability insurance to defendants, Strain Kiser and Collura, for the acts and damages alleged herein.

3.

By amending paragraph 2(a) to read as follows:

At all times material hereto, Harry Lee was responsible for the acts of Edward McClendon and Edward McClendon was acting in the course and scope of his employment with the JPSO.

4.

By adding an additional Count IV to read as follows:

COUNT IV

Negligence, abuse of power, abuse of right, misrepresentation, tortious inference with contract and trespass.

36.

That at all times pertinent hereto, the abuse of Dr. Charbonnet's rights, the entry onto his premises, the seizure of his property, the disruption of his business and all harm which flows therefrom could not have occurred but for and was in fact and law caused by abuse of office and authority, numerous breaches of duty of Harry Lee and Edward McClendon in the following nonexclusive particulars:

1) By aiding, abetting and assisting Lakeside Dental Group, Strain, Kiser and Collura in the seizure of Dr. Charbonnet's property.

2) By not obtaining or requiring appropriate court orders before entering the premises at 5036 Yale Street.

3) By not having proper procedures to protect the rights of individuals in civil disputes.

4) By not following appropriate procedures.

5) By failing to properly conduct the business of the Jefferson Parish Sheriff's Office.

6) By improperly lending an air of authority to and giving assistance and specific support to wrongful seizures knowing that there were court orders and legal processes, including, without limitation, writs of sequestration and attachment, which could have issued in the event of a dispute as to ownership and/or possession of property.

7) By intimidating Dr. Clayton Charbonnet in such a fashion as to prohibit and interfere with his protecting his own rights and property.

8) By refusing to leave 5036 Yale Street when so requested.

9) Such other abuses and wrongs as will be proved at trial.

37.

As a result of the foregoing, Harry Lee and Lt. Edward McClendon are indebted jointly, severally and in solido unto the plaintiffs for all of the damages suffered by Clayton Charbonnet as alleged herein.

38.

Each of the defendants knew or should have known that the seizure of property from 5036 Yale Street was wrongful and would cause Dr. Charbonnet substantial harm. The dentists' actions were negligent and tortious in several respects including but not limited to:

1) Failure to obtain a court order giving rise to a right to seize any property.

2) Failing to properly identify property which they owned.

3) Failing to follow a procedure authorized by law to take custody of any property.

4) Failing to supply the JPSO office with complete and accurate information on the status of the property at 5036 Yale Street.

5) Seizure of property which they had no right to seize.

Harry Lee and Edward McClendon were negligent and tortious in numerous respects including but not limited to:

1) Failing to have in effect proper guidelines for the involvement of the JPSO in matters such as this.

2) Failing to follow or enforce reasonable guidelines for the involvement of the JPSO in matters such as this.

3) Failing to recognize the impropriety of the seizure.

4) Lending assistance to and became a part in a wrongful seizure.

5) Refusing to leave 5036 Yale Street when instructed to do so.

WHEREFORE, Clay Charbonnet and Clay Charbonnet, P.C. prays that this First Supplemental and Amending Petition for Damages be filed and that defendants be duly served and cited with same and that after all due proceedings are had herein, that there be judgment in favor of plaintiffs, Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation and against defendants Continental Casualty Company, Sheriff Harry Lee, Edward McClendon, Donald E. Strain & Associates (A Professional Dental Corporation), James D. Kiser, D.D.S., (A Professional Dental Corporation), Joseph J. Collura, Jr., D.D.S. (A Professional Dental Corporation), Lakeside Dental Group, Donald E. Strain, James D. Kiser and Joseph J. Collura, Jr., Sheriff Harry Lee, Edward McClendon and Continental Casualty Company, jointly, severally and in solido for the amounts prayed for in the

body of the Petition for Damages, and for all costs and attorney's fees and all equitable relief.

LOWE, STEIN, HOFFMAN &
ALLWEISS

By /s/ Michael R. Allweiss
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Attorney for Plaintiff

PLEASE SERVE:

Continental Casualty Company (Original and Supplemental Petition)
Through the Secretary of State
Baton Rouge, Louisiana

Edward McClendon (Original and Supplemental Petition)
Jefferson Parish Sheriff's Office
Through Dan Martiny, Esq.
1100 Causeway Blvd.
Metairie, Louisiana

Harry Lee (Original and Supplemental Petition)
Through his attorney of record:
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Donald E. Strain, D.D.S. (Supplemental Petition)
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